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Supreme Court, U. S.
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IN THE

Supreme Court of The United States

OCTOBER TERM, 1971

No. 71-1590

MORRISON HAMLETT,

Petitioner,

vs.

CONCO, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No.

MORRISON HAMLETT,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Morrison Hamlett, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit decided January 20, 1972 (Appendix A) is not officially reported. There was no opinion in the United States District Court for the Eastern District of Virginia.

Norfolk Division.

JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. 1254 (1). Jurisdiction in the District Court was by diversity of citizenship, the amount in controversy exceeding $10,000.00, exclusive of interest and costs. The date of the judgment sought to be reviewed was entered January 20, 1972. On March 9, 1972, an order was entered denying the petition for rehearing.

QUESTIONS PRESENTED FOR REVIEW

I. Whether safety codes for cranes, published subsequent to the manufacture and sale of the crane, were admissible as relevant to the degree of care required.

II. Was evidence admissible through safety codes published subsequent to the manufacture and sale of the crane that a manufacturer has a continuing duty to recall its crane which it failed to equip with a safety device known as a rail sweep?

III. Was evidence admissible through safety codes to show that subsequent design of a crane with a rail sweep was practicable and feasible to place in the crane at the time it was originally built?

IV. Did the trial court properly charge the jury that petitioner would be denied recovery, if the modification of the crane by a third party contributed in any degree to cause the accident?

V. On voir dire, was petitioner entitled to inquire of the jury panel as to the former occupations of retired persons husbands' occupations of the female jurors?

VI. Was the charge as to contributory negligence and assumption of risk erroneous?

STATUTES INVOLVED

The statutes involved are Rules 43(a) and 51, Federal Rules of Civil Procedure. Rule 43(a) states:

> "All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made."

Rule 51 states:

> "At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed."

STATEMENT OF THE CASE

The District Court entered judgment on a jury verdict for the respondent. The Court of Appeals for the Fourth Circuit affirmed, a per curiam opinion. Petitioner applied for a rehearing, which was denied by the Court of Appeals.

The following facts are material to the consideration of the questions presented. Respondent designed, manufactured and sold in July of 1942 an electric overhead traveling crane, which was installed in Fort Monroe, Hampton, Virginia. In 1966, Globe Iron Construction Company, Incorporated, purchased this crane and installed it in its premises in Norfolk, Virginia.

On July 19, 1968, Globe Iron Construction Company, Incorporated, engaged petitioner's employer, J.H. Steen & Sons, to do certain painting work at its premises. Petitioner on said date, while in the course of his duties as a painter, sustained serious permanent injuries when the crane, without warning to him, ran over his hand.

Respondent had failed to install a safety guard known as a rail sweep at the time of petitioner's injuries on July 19, 1968, and had failed to equip its crane in July, 1942, with a safety guard.

The District Court refused to permit in evidence "American Standards Association Safety Codes for Cranes," published January 1, 1943, which required cranes installed prior to that date to be modified by the installation of a rail sweep.

Petitioner introduced expert evidence that a rail sweep, mounted ahead of the crane wheels, would have swept or cleared the rail upon which the crane wheels ride, and the accident would not have happened.

Likewise the trial court refused to permit into evidence safety codes published in 1967 by the American Standards Association, requiring cranes to be equipped with rail sweeps extending below the top of the rail and projecting in front of the crane truck wheels.

The trial court also refused to permit into evidence entitled "Specifications for Electric Overhead and Traveling Cranes," published by the Crane Manufacturer's Association of America, Inc., requiring substantial guards in front of each wheel and projecting below the top of the run-way rail.

In its charge to the jury, the court said:

> "If the modifications made by Globe Iron contributed in any degree to proximately cause or contribute to the plaintiff's accident and resulting injury, then the plaintiff could not recover from Conco either on the theory of negligence or on the theory of breach of warranty."

ARGUMENT AMPLIFYING REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

1. The decision of the Court of Appeals as to the admissibility of the safety codes conflicts with Rule 43(a) and the following cases: *Boston and Maine R.R.* v. *Talbert*, 360 F2d 286 (1st Cir. (1966); *Edmonds, Inc.* v. *Vojka*, 332 F2d 309 (D.C. Cir. 1964); *Curtis* v. *District of Columbia*, 363 F2d 973 (D.C. Cir. 1966); *Klein* v. *District of Columbia*, 409 F2d 164 (C.A. D.C. 1969); *Noel* v. *United Aircraft Corporation*, 342 F2d 232 (3rd Cir. 1965); *Boeing Airplane Company* v. *Brown*, 291 F2d 310 (9th Cir. 1961); *Provenza* v. *American Export Lines, Inc., et al*, 324 F2d 660 (4th Cir. 1964).

In *Edmonds, Inc.* v. *Vojka*, 332 F2d 309 (D.C. Cir. 1964), although a building was completed in 1922, the Court held that a building code published in 1951 was admissible in a personal injury suit resulting from the absence of hand rails as a standard of accepted practice by which to measure the conduct of the defendant.

In *Noel* v. *United Aircraft Corporation*, 342 F2d 232 (3rd Cir. 1965), the Court held that the manufacturer has a continuing duty to improve its design where the facts of human safety is involved.

In *Boeing Airplane Company* v. *Brown*, 291 F2d 310 (9th Cir. 1961), the Court held that evidence of subsequent changes is admissible in evidence to show that it was practical and feasible for the manufacturer to install a safety device in its equipment at the time it was originally built.

It is common knowledge that all car manufacturers in recent times have recalled cars containing faulty design of parts. The purpose of such recall of cars is to protect the user of the cars. Where there was evidence offered by petitioner to show that within six months of the manufacture, design and sale of its crane, safety codes were published requiring overhead cranes built prior thereto to be equipped with a rail sweep as a safety device, such evidence should have been admitted by the trial court under Rule 43(a) and under the cases cited in this petition.

2. The decision of the Court of Appeals as to the accuracy of the charge to the jury conflicts with Rule 51 and the following cases: *Smith* v. *Hobart Mfg. Co.*, 194 F. Supp. 530 (D.C. Pa. 1961); *Pierce* v. *Ford Motor Co.*, 190 F2d 910 (4th Cir. 1951); *Atlantic Greyhound Corporation* v. *McDonald*, 125 F2d 849 (4th Cir. 1942); *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 284 F2d (9th Cir. 1960).

By charging the jury that the petitioner could not recover from respondent on either theory of negligence or breach of warranty, if the modifications to the crane by Globe Iron contributed in any degree to proximately cause or contributed to petitioner's accident and resulted in injury,

the Court erroneously overlooked that negligent design by the respondent, if it created an unreasonable risk of harm to petitioner, would make respondent liable. The charge did not correctly state the law as to an intervening cause or a supervening cause.

3. The decision of the Court of Appeals as to questions on voir dire conflicts with the following cases: *Dennis* v. *U.S.*, 339 U.S. 162, 70 S. Ct. 519, 94 L. Ed. 734 (1950); *Kiernan* v. *Van Schaik*, 347 2d 775 (3rd Cir. 1965).

The panel of jurors was selected from a number of rural counties, as well as towns and cities in the Eastern District of Virginia, Norfolk Division. Counsel for petitioner could not obtain information as to the occupation of spouses of prospective female jurors, nor former occupations of retired jurors. The Court refused to permit inquiries of the panel as to such occupations. It is submitted that such refusal was prejudicial.

In *Dennis* v. *U.S.*, 399 U.S. 162, 70 S. Ct. 519, 94 L. Ed. 734 (1950), at pages 171-172, the Supreme Court said:

> "Preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury."

The Court said further, at page 781:

> "It is not enough, therefore, to grant the rights of preemptory challenge and challenge for cause and then limit the factual basis for their use to the visible appearance of the jurors and the scant information on the jury list of their residence and occupation. While the practical limitations of a trial make it impossible to permit the parties on voir dire to penetrate deeply into the minds and emotions of prospective jurors..... at least the visible bias which generally bind men to

one side of a cause are clearly within the limited range of appropriate interrogation on voir dire."

In *Kiernan* v. *Van Schaik*, 347 2d 775 (3rd Cir. 1965), the Court said at page 779:

"Litigants, therefore, have the right, at the least, to some surface information regarding the prospective jurors. Such information may uncover ground for challenge for cause. If it does not, it will be available in the intelligent use of the preemptory challenge which is the antithesis of challenge of cause."

4. The decision of the Court of Appeals as to the correctness of the charge to the jury as to assumption of risk in contributory negligence conflicts with the following cases: *Brockett* v. *Harrell Bros.*, 206 Va. 457, 143 S.E.2d 897; *Davis* v. *Sykes*, 202 Va. 952, 121 S.E.2d 513.

The Court charged the jury as follows:

". . . it is also true that if he, in climbing the ladder, had looked and seen this crane coming down and then with knowledge of what might happen puts his hand on that rail well a man who wants to commit suicide can always make the grade, I guess, if he is sincere enough about it."

There was no evidence that petitioner knew and appreciated danger from a moving overhead crane and placed his hand upon the rail, or that he even saw the crane moving. The power to the crane was to be cut off.

Under the Virginia cases, petitioner could not be denied recovery unless the condition was known, visible or obvious to him.

CONCLUSION

The facts and the law in this case create the opportunity

of the Supreme Court to rule upon:

A. The decade of 1970 hue and cry of consumerism—the duty of the manufacturer, where it begins and ends.

B. The propriety of the examination of the jurors upon voir dire.

C. Whether the negligence of the manufacturer must be the sole proximate cause, or is a concurring or contributing proximate cause sufficient.

D. What constitutes assumption of risk where the public is involved?

E. Whether contributory negligence is a factor.

F. Has the public a right to assume the product is satisfactory?

G. Has the manufacturer a duty (as is recognized by General Motors) to correct an error during the reasonable life of the product?

It is respectfully submitted that the petition for writ of certiorari should be granted and that the decision of the Court of Appeals should be reversed with directions to the District Court to grant a new trial.

Respectfully submitted,

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